FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 59

SAM THOMPSON, Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, Respondents.

On Writ of Certiorari to the Police Court
of the City of Louisville.

BRIEF FOR PETITIONER.

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OF THE CITY OF LOUISVILLE.

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OPINIONS BELOW.

The Louisville Police Court rendered no opinion. The judgment of Jefferson Circuit Court in a *habeas corpus* proceeding brought for the purpose of obtaining stay and bail pending review by this Court is unreported, but is reproduced in Appendix B to the petition for certiorari (p. 29). The majority and dissenting opinions of the Kentucky Court of Appeals on appeal in the *habeas corpus* proceeding (styled *Taustine* v. *Thompson*) are reported at 322 S. W. 2d 100 (Ky., 1959), and are also reproduced in said Appendix B (pp. 35, 40).

JURISDICTION.

The judgments of the Police Court were entered on February 4, 1959 (R. 75-77). The petition for certiorari was filed May 1, 1959, and was granted June 22, 1959. The jurisdiction of this Court rests on 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Whether criminal convictions which are unsupported by any evidence of guilt constitute wholly arbitrary official action and thereby violate the due process clause of the Fourteenth Amendment.

2. Whether the failure of Kentucky to provide corrective judicial process whereby Federal constitutional objections to such convictions can be adjudicated, violates the due process clause of the Fourteenth Amendment.

3. Whether such convictions deny petitioner all possibility of effective redress against illegal and arbitrary arrests, and thereby violate the due process clause of the Fourteenth Amendment.

4. Whether, in view of the fact that the said arrests were made in reprisal for petitioner's insistence on his Federally protected rights to retain counsel and demand a trial on an earlier criminal charge, the foreclosure of effective redress against such arrests infringes said right to counsel and right to a judicial hearing, and thereby violates the due process clause of the Fourteenth Amendment.

ORDINANCES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The convictions here under review were based upon §§ 85-8, 85-12 and 85-13 of the Ordinances of the City of Louisville, which provide:

§ 85-8. *Disorderly Conduct, Penalty.* (a) Whoever shall be found guilty of disorderly conduct in the City of Louisville shall be fined not less than five dollars ($5.00) nor more than one hundred dollars, ($100.00) or imprisoned not exceeding fifty (50) days, or both so fined and imprisoned.

(b) In addition to imposing a fine, the Police Court may hold the offender to bail in a sum not exceeding one thousand dollars ($1,000.00) to keep the peace, or be of good behavior for any length of time not exceeding one year.

(c) Should the offender fail to give bond or fail to pay the fine, he shall be forthwith committed to the city workhouse, and shall be kept in custody until bail be given, or until the time fixed by the judgment shall have expired and the fine be paid or satisfied by labor as provided by law.

§ 85-12. *Loitering, Prohibited.* It shall be unlawful for any person or persons, without visible means of support, or who cannot give a satisfactory account of himself, herself, or themselves, to loaf, congregate, or loiter upon, along, in or through the public streets, thoroughfares, or highways of the City of Louisville; or for such person or persons to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained

the consent of the owner or controller of said premises, structure, or building; or for such person or persons to sleep or lie in or upon any public thoroughfare, highway, park, boulevard, or wharf of the City of Louisville; or for such person or persons to beg or solicit alms in the streets or the highways of the City of Louisville; or for such person or persons to habitually consort with bawds, thieves, malefactors, or other disreputable or dangerous characters in the City of Louisville.

§ *85-13. Penalty.* Any person violating this ordinance shall be guilty of the offense of loitering, and shall be liable to arrest therefor; and for each offense shall be punished by a fine of not exceeding fifty ($50.00) dollars, or he shall be compelled to give bond in the sum of not less than one hundred ($100.00) dollars nor more than one thousand ($1,000.00) dollars, conditioned upon his or her good behavior, and keeping the peace for not exceeding one year; and in default of such bond, if the same be required, the defendant shall be imprisoned in the workhouse, and there confined during the period said bond was to cover, or until the same shall be executed as required; or the defendant may be both so fined and required to execute a bond to be of good behavior as aforesaid in the discretion of the court.

Other statutes and constitutional provisions referred to herein provide in pertinent part:

Kentucky Constitution, § 110. Jurisdiction and Powers of Court of Appeals.

The court of appeals shall have appellate jurisdiction only, which shall be co-extensive with

the state, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law. Said court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions.

Kentucky Revised Statutes, § 26.010. Criminal and Penal Jurisdiction of police courts.

Except as provided in KRS 167.990, 199.990 and 242.990,* police courts in cities of every class have jurisdiction exclusive of circuit courts in all penal and misdemeanor cases where the punishment is limited to a fine of not more than twenty dollars, jurisdiction concurrent with circuit courts of all penal and misdemeanor cases where the punishment is limited to a fine of not more than five hundred dollars, or imprisonment not exceeding twelve months, or both, and exclusive jurisdiction of all violations of city ordinances, occurring within the city limits.

Kentucky Revised Statutes, § 26.080. Appeals to Circuit Court and Court of Appeals from police court in cities of first class.

(1) In cases where a fine of twenty dollars or more is imposed by the police court in a city of the first class, appeal may be taken to the circuit court.

(2) In cases where a fine of twenty dollars or less is imposed under an ordinance of a city of the first class, the legality of the ordinance may be tested by the city by an appeal to the circuit court, or by the defendant by a writ of prohibition to the

*Said exceptions are not material here.

circuit court, and after a decision has been rendered in the circuit court either the city or the accused may appeal from the circuit court to the Court of Appeals.

(3) In all cases where, in addition to a fine, imprisonment exceeding ten days is imposed by the police court in a city of the first class, the defendant may appeal to the circuit court, and thence to the Court of Appeals, except in cases in which bail has been required for good behavior and has not been given.

Kentucky Revised Statutes, § 26.400. Jury in Police Courts.

(1) In cities of the first class, the police court shall try without a jury all cases involving the right to the custody and care of children. It shall not impose a penalty exceeding fifty days' imprisonment or a fine of one hundred dollars without the intervention of a jury, unless the right to a jury is waived by the accused.

(2) In cities of the second class, the police court may use a jury in any case, and where the penalty may be a fine of twenty-five dollars or more or imprisonment, other than in commutation of a fine, the accused may, at or before the time the case is called for trial, demand a jury. Jurors shall be summoned by the chief of police, or by a policeman under his direction. The court shall have the same power to hold or excuse their attendance that circuit courts have. The city legislative body may fix jury fees, not to exceed those allowed in justice courts.

(3) In cities of the third class, the city or the accused may demand a jury in all cases in the

police court where the penalty may be imprisonment or a fine of more than fifty dollars.

(4) In cities of the fourth class, the accused may demand a jury in all cases in the police court where the fine may be more than twenty dollars.

(5) In cities of the fifth and sixth classes, the use of a jury in the police court in criminal cases is governed by Cr.C 319.

Kentucky Revised Statutes, § 436.520. Vagrancy.

(1) Any person guilty of being a vagrant shall, for the first offense, be fined ten dollars or imprisoned for thirty days, or both. For the second and each subsequent offense, he shall be imprisoned for sixty days.

(2) "Vagrant," as used in subsection (1) of this section and KRS 436.530 means:

(a) Any able-bodied male person who habitually loiters or rambles about without means to support himself, and who has no occupation at which to earn an honest livelihood; or

(b) Any able-bodied male person without visible means of support who habitually fails to engage in honest labor for his own support or for the support of his family, if he has one; or

(c) Any idle and dissolute able-bodied male person who purposely deserts his wife or children, leaving any of them without suitable subsistence or suitable means of subsistence; or

(d) Any able-bodied person without visible means of support who habitually refuses to work, and who habitually loiters on the streets or public places of any city.

Kentucky Criminal Code of Practice, § 319. Trial of issues of law and fact.

The issues of law and fact shall be tried by the judge; in all cases in which the only punishment is a fine of sixteen dollars or less; in other cases the defendant may demand that issues of fact be tried by a jury.

Kentucky Criminal Code of Practice, § 332. Jury trial; summoning jury.

Upon a jury trial being lawfully demanded, the justice shall order a peace officer to summon a sufficient number of qualified jurors, from which the jury may be formed.

STATEMENT.

Although the case now before the Court was initiated by an arrest made January 24, 1959, full understanding of the issues requires reference to two earlier misdemeanor cases which involved arrests made January 10 and 14.* The facts of these earlier cases, in so far as they are pertinent, appear in the present record.

On January 10, petitioner was arrested without a warrant by officer F. Fletcher of the Louisville Police Force and was charged with disorderly conduct. He retained counsel and on January 12 appeared in Police Court and demanded a trial, whereupon the case was assigned for trial January 27 and he was released on bond pending trial (R. 69).†

*All dates given herein are in 1959.

†On January 27th this charge was filed away (R. 70).

At about 3:45 P. M. on January 14, two days after being thus released, petitioner was sitting in the colored waiting room of the Union Bus Station in Louisville, waiting for a bus to Buechel, Kentucky, a suburb of Louisville, where he lived. Officer Fletcher and officer Suter, another Louisville policeman, entered the waiting room and arrested him without a warrant, charging him with the crimes of vagrancy and loitering. After his arrest, while conveying him to Police Headquarters, one of said policemen subjected petitioner to verbal abuse and some slight physical abuse, giving him to understand that he had been thus re-arrested because he had retained counsel, pleaded not guilty and demanded a trial on the previous disorderly conduct charge, which would put officer Fletcher to the trouble of appearing in court to testify in that case (R. 69-70).

Petitioner again retained counsel, pleaded not guilty and demanded a trial, whereupon this case was assigned for trial January 20 (R. 69-70). The evidence is summarized at pages 5-7 of the petition for certiorari, and is commented upon in some detail at pages 48-51, *infra*. There was no evidence whatever that petitioner was guilty on either charge; the uncontradicted evidence affirmatively established his innocence.

The Court found petitioner guilty of loitering, basing the decision solely on the fact that he had been arrested before on similar charges (R. 63).

The Court rejected a request by petitioner's counsel to reserve decision until the testimony could be

transcribed and a brief filed (R. 62). The Court proposed to fine petitioner $10 on the loitering charge; but, fines under $20 not being appealable, the Court stated its willingness to impose a $20 fine on that charge. An appealable $20 fine was thereupon requested and imposed.

On the vagrancy, the Court proposed to file the charge away. Petitioner having objected to this and requested a dismissal, the Court (without further testimony or argument) found petitioner guilty of vagrancy and, though willing to impose a $10 fine, offered petitioner an appealable sentence of 30 days in jail, which petitioner accepted (R. 62-64). An appeal was perfected forthwith and petitioner was released on bond.*

At 6:53 P. M. on January 24, four days after this trial, petitioner was again arrested without warrant while waiting for a bus to his home. This time he had taken the precaution of not waiting in the bus station.† Instead, he had waited in a small tavern, the Liberty End Cafe, a few blocks east of the station and about half a block from where the bus stops (R. 19, 22). He was charged with loitering and disorderly conduct, the case being tried February 3.

The testimony on this trial is analyzed in Point I of this brief, *infra*, where it is shown that there was no evidence of guilt whatever.

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*On the appeal the case was tried *de novo* before a jury in Jefferson Circuit Court on March 18th. A verdict of acquittal was returned on peremptory instruction by the Court.

†"Mr. Suter always arrests me when I go there [to the bus station] to catch the bus to go to Buechel" (R. 54).

At the close of the prosecution's case, and again at the close of the whole case, petitioner moved to dismiss on the same Federal Constitutional grounds which are now urged in this Court (R. 33, 71) and requested an opportunity to argue the latter motion on the basis of the transcript (R. 31). The motions were overruled (R. 30). Petitioner was then found guilty of both charges. He was fined $10 on each charge, the Court not offering this time to impose appealable sentences (R. 31).

A motion for new trial on the same Federal grounds having been overruled (R. 32, 74), petitioner's remedies in the Police Court were exhausted. Because of the smallness of the fines, the judgments were not appealable to, or otherwise reviewable by, any state court. Petitioner therefore filed his petition for certiorari in this Court.

SUMMARY OF ARGUMENT.

1. There was not a shred of evidence to support the judgments of Louisville Police Court here under review, convicting petitioner of loitering and disorderly conduct and sentencing him to a $10 fine on each charge. Moreover, the uncontradicted evidence affirmatively showed that petitioner had committed neither of the alleged offenses. The actual reason for petitioner's conviction was that he had a prior arrest record.

No question of credibility is involved. Petitioner's claim that there was a complete failure of proof does

not depend upon the resolution of credibility issues, if any.

It is a denial of property without due process of law to convict and fine a defendant without evidence of guilt.

2. The convictions are not reviewable, on appeal or otherwise, in any Kentucky court. No judgment of the Louisville Police Court, however arbitrarily wrongful and however obviously unconstitutional, will be set aside if the sentence is a fine less than $20 (with or without imprisonment for ten days or less). Within these limits, Kentucky law thus vests the Louisville Police Court judge with absolute and arbitrary power.

3. The Kentucky Court of Appeals has refused to review cases such as this on the ground that $10 criminal fines do not constitute "great and irreparable injury" to the defendant. For several reasons, this position is erroneous.

First: The amount of the fines here involved, though relatively small, is large enough to work hardship on this petitioner; and they are subject to indefinite multiplication.

Second: The conviction of crime, regardless of the amount of the sentence, has serious adverse consequences upon the defendant.

Third: The right which the due process clause protects is the right to essential justice. That right is not susceptible of measurement in purely monetary terms.

Fourth: As this record shows, arbitrary Police Court power is susceptible of delegation to the police. Thus empowered, the police with impunity can and do invade the most precious liberties of the citizen, including even his right to be free of arbitrary police intrusion, which is guaranteed to him by the due process clause of the Fourteenth Amendment.

4. The arbitrary power vested in the Louisville Police Court judge has been delegated by him to the Louisville Police. This record shows that the police have arrested and prosecuted petitioner repeatedly without legal cause. Under Kentucky law the effect of the judgments of conviction entered in this case is to deprive petitioner of civil redress for malicious prosecution or false imprisonment, and thus to deprive him of the only effective deterrent against arbitrary police action. Although this circumstance has been specifically brought to the attention of the Police Court judge, he has unequivocally shown that he will under no circumstances acquit petitioner of charges preferred against him by the police. He has thus in effect licensed them to arrest him at will.

The record also shows that the arbitrary power thus conferred upon the police has been used to take reprisal upon petitioner for exercising his Federally protected right to retain counsel and demand a trial on a previous unfounded disorderly conduct charge. Although this circumstance has also been specifically brought to the attention of the Louisville Police Court judge, he has entered the judgments here complained of; and those judgments, by foreclosing the possibility of civil redress

against such police action, abrogate petitioner's immunity from punishment for exercising his right to retain counsel and demand trial. That immunity must be accorded Federal protection; otherwise petitioner's Federal right would be stripped of all substance.

ARGUMENT.

I. The Convictions Here Under Review, Being Unsupported by Any Evidence, Deprive the Petitioner of Property Without Due Process of Law.

There was *no* evidence that petitioner was guilty either of loitering or of disorderly conduct. The respondents have contended that the Police Court's decision simply resolved an asserted conflict in the testimony (Brief in Opposition, pp. 8-12), thereby implying that there was some evidence of guilt. But if all the supposed conflicts are resolved in respondents' favor, the record is still devoid of any such evidence.

In this criminal case the issues before the Police Court were necessarily defined by the charges made. "Conviction on a charge not made would be sheer denial of due process." *De Jonge* v. *Oregon*, 299 U. S. 353, 362 (1937); *Cole* v. *Arkansas*, 333 U. S. 196, 201 (1948). We must therefore look to the applicable ordinances to see what conduct is penalized. The loitering ordinance provides, in pertinent part:

> "It shall be unlawful for any person * * *, without visible means of support, or who cannot give a satisfactory account of himself, * * * to sleep, lie, loaf, or trespass in or about any premi-

ses, building, or other structure in the City of Louisville, without having first obtained the consent of the owner or controller of said premises, structure or building; * * *."

The arresting officers made no inquiry as to petitioner's means of support. Petitioner affirmatively showed that he owned real property and was regularly employed (R. 14, 16-18, 45-47). The prosecutor expressly disclaimed any charge that he had no visible means of support (R. 16).

In order to prove its case, the prosecution therefore had to prove (a) that petitioner could not "give a satisfactory account of himself," and (b) that he was loafing or trespassing in the Liberty End Cafe (c) without having first obtained the consent of the owner or controller of those premises. A failure of proof on any of these three points would require an acquittal. Actually, as we shall now show, there was a failure of proof on all three of them.

(a) *"Satisfactory account of himself."* Assuming (without conceding) that a policeman can constitutionally be empowered to require an orderly person, against whom no complaint has been made, to "give a satisfactory account of himself," and further assuming (also without conceding) that the ordinance is not void for vagueness, the record shows without contradiction that petitioner could and did give a wholly satisfactory account of himself by responsively and truthfully answering the only questions the arresting officers put to him. They asked him his name and address, which he gave them (R. 3, 22). The only other question they

asked him was "what was his reason for being in there" (R. 2). He said he was waiting for a bus to his home (R. 3). This was a "satisfactory account" under any objective definition of the term. It will hardly be contended that an account which would satisfy any reasonable man was unsatisfactory simply because the arresting officers say it was. See *Davis* v. *Schnell,* 81 F. Supp. 872, 878 (S.D. Ala., 1949), affirmed without opinion 336 U. S. 933 (1949); quoted by Mr. Justice Black in *Barsky* v. *Board of Regents,* 347 U. S. 442, 464 n. 13 (1954).

The only reason given by Officer Lacefield for considering the answer unsatisfactory was that the bus stopped half a block away and did not run directly in front of the cafe (R. 2, 6). But it is undisputed that petitioner's bus runs on a fixed schedule—an hour and a quarter between buses at that time of day—and that the next bus was not due for about half an hour (R. 23, 67). Thus there was no need for petitioner to maintain a constant lookout at the bus stop; and his election to remain indoors on that January evening, until the bus was about due, did not justify disapproval of his "account of himself."

As a matter of fact, Officer Lacefield did not contend otherwise. What he testified was that *he didn't know* the bus ran on a fixed schedule (R. 6). But the question in this criminal case is not whether the arresting officer had any reasonable basis for his mistaken belief that petitioner's "account of himself" was implausible. If petitioner's account was actually satisfactory, as it clearly was, he cannot be convicted of crime because the

officer lacked knowledge of the easily ascertainable (and generally known) fact that suburban buses run on schedules. Petitioner had the bus schedules in his pocket (R. 19)* and could easily have explained his "account of himself" if an explanation had been called for. But the officers, in their eagerness to effect the arrest, made no further inquiry. So far as appears, they did not even tell petitioner why they considered his account of himself to be unsatisfactory. (Nor has the prosecutor done so: Nor the Police Court judge.)

(b) *"Sleep, lie, loaf, or trespass."* There is no claim that petitioner was asleep or lying down. He could not have been a trespasser, since the manager of the cafe knew he was there and made no objection to his presence (R. 27). Respondents' claim must be that he was loafing.

Petitioner had been in the cafe a little over half an hour before he was arrested (R. 2). He testified without contradiction that he had bought a dish of macaroni and a glass of beer from a waitress or attendant other than Mr. Marks, the manager (R. 19).

The fact that petitioner, after finishing his meager meal, lingered in the cafe on that winter night, chatting with his friends and shuffling his feet to the music of the juke-box as he waited for his bus (R. 21), is no evidence of criminal loafing. If that rather vague term could be stretched to cover such conduct, half the population of Louisville would be criminals.

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*We regret that a printer's error has occurred at page 19 of the printed record. Reference to the original certified transcript will show the question at the 7th line from the bottom of that page should read, "Did you have a bus schedule with you?".

(c) *"Consent of the * * * controller of said premises."* The record can be searched in vain for any evidence that petitioner entered or remained in the cafe "without first having obtained the consent of the owner or controller of said premises." When the owner of the cafe hung out its sign and opened its doors, he invited petitioner and other members of the public to enter. As is said in 52 Am. Jur., tit. "Trespass," § 39:

> "Consent may be implied from custom, usage, or conduct. Thus, the opening of an office to transact business with the public is a tacit invitation to all persons having business with the proprietor, and a permission to others, to enter his place of business." (Footnotes omitted.)

Mr. Marks, the controller of the premises, knew that petitioner was there. He made no objection to anything petitioner did, and did not ask him to leave (R. 27, 29). No clearer proof of consent could be demanded.

The consent question can be disposed of even more simply. Under the loitering ordinance, lack of consent is an element of the offense. The prosecution had the burden of proving it. Mr. Marks was in court and available to testify. But the prosecution offered no scrap of evidence on the issue. The failure of proof was complete.

As for the disorderly conduct charge, the only evidence was that after petitioner's arrest "he was very argumentative—he argued with us back and forth" (R. 3). There was no charge that petitioner had re-

sisted arrest, or attempted to escape, or doubled up his fists, or used bad language, or even raised his voice. His testimony that he was respectful to the arresting officers (R. 24) is uncontradicted. The only evidence as to the substance of the conversation was petitioner's testimony that "I just asked them what they arrested me for" (R. 24). For all that appears, he may simply have been continuing his endeavor to give them a "satisfactory account of himself."

For two reasons, this evidence failed to prove disorderly conduct. In the first place, petitioner's conduct after his arrest was not disorderly, and could not have been punished as such even if the arrest had been lawful. Courts of other states have consistently held that simple argument with an arresting officer does not constitute disorderly conduct. See, *e.g.*, the cases collected in Annotation, 34 A. L. R. 566, 568-570. Vague as the term is, it is not without limits; and there is no reason to believe that the Kentucky courts would repudiate these authorities and adopt the dangerous notion that an arrested person must desist from all efforts to convince the police that they have erred.

As a matter of fact, the Kentucky Court of Appeals has made it clear that one *must* object to an arrest which he believes to be illegal, in order to avoid waiving his right to be forthwith informed of the charge against him as provided by § 39 of the Criminal Code of Practice. In *Nickell* v. *Commonwealth*, 285 S. W. 2d 495 (Ky., 1955) the Court held that the right had been waived because the defendant had acquiesced in the arrest. The Court said (at p. 496):

> "He [the defendant] did not ask why *or indicate any notion that his rights were being imposed upon* by being arrested without cause. He readily submitted to the arrest and must be deemed to have waived a full compliance by the officers of the technical requirements." (Emphasis added.)

Surely action which is necessary to preserve a valuable procedural right cannot be considered criminal. Compare *Sternberg* v. *Hogg*, 254 Ky. 761, 72 S. W. 2d 421 (1934).

In the second place, petitioner was privileged not merely to argue but even to resist the arrest until he was informed of the nature of his alleged offense. *Johnson* v. *Commonwealth*, 240 Ky. 337, 42 S. W. 2d 341, 342 (1931). There was no showing that the argument (if any) took place before or after the arresting officers told petitioner what he was being charged with. Officer Lacefield testified that the argument occurred outside the cafe (R. 3) and petitioner testified without contradiction that he was not told the nature of the offense until he asked the officers what he was arrested for—which he did after they had taken him outside (R. 24-25).

Our purpose in reviewing the evidence has not been to burden this Court with the resolution of evidentiary conflicts but to demonstrate that the Court need not concern itself with them. The respondents have declared that the case involves only a "conflict of testimony between the arresting officer and the accused" (Brief in Opposition, p. 12). We have shown that it is not so. Resolving all credibility questions in respondents' favor, the record is still empty of any evidence of guilt.

In their effort to make this into a fact case, the respondents have purported to describe some evidentiary conflicts which do not exist (Brief in Opposition, pp. 9-11). A brief comment, in order to keep the record straight, is therefore appropriate.

(a) There is no conflict as to the nature of petitioner's dancing. Officer Lacefield did not describe it, except to say that it was a solo dance and was not obscene or vulgar (R. 2). Defendant said he was patting or tapping his foot (R. 21). Mr. Marks said petitioner was "patting his foot—he was moving his foot and going down like this" (R. 26). He accepted the prosecutor's description of the dance as a "shuffle dance" (R. 27). The trial judge declined to let the dance be demonstrated in court by petitioner or Officer Lacefield (R. 9, 21). There is no reason to doubt that each of the witnesses, in his own words, was describing the same thing.

(b) Mr. Marks did not contradict petitioner's testimony about the beer and macaroni. To be sure, he testified that *he* did not see the petitioner eat anything, and when first asked by the prosecutor whether he wouldn't have known about it if petitioner had had anything to eat or drink, he tentatively answered, "It seems like I would." But immediately afterward, on his own volition, he made the flat statement that his failure to see petitioner buy anything "don't mean he didn't buy anything" (R. 28).

(c) Respondents have engaged in a painstaking analysis of time intervals in an effort to show that petitioner could have caught the 6:15 P.M. bus if he had

wanted to. We are somewhat puzzled at their emphasis on this point. Even if he could have caught the earlier bus, what of it? The fact that he missed one bus does not tend to impeach his "account of himself"; he was surely entitled to wait for the next one. And we fail to understand how respondents can criticize him for taking time to get something to eat and drink—which he would hardly have had time to do before the earlier bus came, even if respondents' time schedule were correct.

In fact, however, it is not correct. Respondents' elaborate chain of inferences starts with the fallacious premise that officer Lacefield, in fixing the time of the arrest at 6:53 P.M., was referring to an event which took place 5 to 7 minutes after petitioner had been taken outside the cafe. But the officer's uncontradicted testimony was that the arrest took place *inside* the cafe (R. 1). Mr. Marks confirmed this (R. 26). The 5 to 7 minute interval thus drops out of respondents' time schedule.

The foregoing review of the evidence shows that there was no factual basis whatever for the adjudications of guilt. The question is thus one of law, not of fact. As this Court said in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 109-110 (1902):

> "* * * if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts

being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being *a question of law simply*, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster General, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order.

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. *Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual.*" (Emphasis added.)

It should now be clear that these convictions, being unsupported by any evidence, constitute a naked assertion of arbitrary judicial power—the very antithesis of due process of law. Even in an alien deportation case, and even on collateral attack, this Court has held (*U. S. ex rel. Vajtauer* v. *Commsisioner*, 273 U. S. 103, 106 (1927)):

> "Deportation * * * on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus.*"

See also *Moore* v. *Dempsey,* 261 U. S. 86 (1923) (due process held denied where "the whole proceeding is a mask").

In Point II of this brief we shall discuss the constitutional objections to arbitrary official power. In Points III and IV we shall show how arbitrary power has affected the petitioner. But first let us see how it affects a court which possesses it.

The present record affords an unusually illuminating insight into the concrete meaning of arbitrary power, as it exists in the Louisville Police Court. Until now we have examined the evidence from a negative viewpoint, our objective being to demonstrate that the record does *not* contain any evidence of guilt. We have therefore put on our appellate blinders and have excluded from consideration that part of the proceedings which are not relied upon by the respondents as constituting evidence of guilt.

Strictly speaking, this is enough. Having established that the judgments cannot be based on any lawful premise, petitioner need not go further and show what particular *unlawful* premise they *were* based on. Were that required, the due process prohibition upon arbitrary action would in many cases be impossible to apply; for a tribunal can often remain silent as to the actual reasons for its action, and indeed it will have a natural tendency to do so if it realizes that those reasons are legally insufficient.

But now let us take off our blinders and see what the record tells us about the Louisville Police Court.

At the beginning of the January 20 trial the Police Court judge was evidently unaware that petitioner had ever been arrested before. And for a time he conducted the trial in fairly close conformity with the law, manifesting no reluctance to protect petitioner's procedural rights and apply the accepted principles of the law of evidence. He granted petitioner's motion for a separate trial (R. 36). He sustained a hearsay objection (R. 36). He excluded from evidence a felony record offered by the prosecution when it was shown to belong to another Sam Thompson much older than petitioner (R. 38).

Then, in the course of cross-examination by petitioner's counsel, the arresting officer who was the sole prosecution witness (officer Suter) volunteered that he had arrested petitioner before. *From then on the Court did not make a single ruling in petitioner's favor, either in that trial or in the trial which followed on February 3* (R. 40). Each of the many admissibility points, and each of the issues as to the sufficiency of the evidence, was summarily resolved against him. The judge's mind had frozen as soon as the previous arrests were disclosed to him.

Indeed, he specifically said so. In finding petitioner guilty of loitering at the January 20 trial, he said (R. 63):

> "The officer has testified he has arrested this man before on similar charges and I am basing my decision on that."

And the prior arrests were evidently a determining factor also in the February 3 convictions here under review. At the close of that trial, and just before finding petitioner guilty, the Court said, in an evident attempt to justify the convictions (R. 31):

> "Let the record show that the prosecutor has shown me a record for this defendant totaling fifty-four arrests."

The pertinent point is that the judge was not acting on a purely visceral basis. He was applying a *rule*—a rule that no defendant who has an arrest record will be acquitted. Moreover, it makes no difference whether it is a *long* arrest record; at the first trial there was no showing how many times petitioner had been previously arrested, there being simply a reference to "arrests" (R. 40). But this was enough to preclude an acquittal.

To be sure, such a rule has no remote connection with the law; but it is a rule nevertheless. It provides a basis for predicting future action under like circumstances.

Respondents have said that the Louisville Police Court handles more than 25,000 cases a year (Brief in Opposition, p. 2); and we have no reason to doubt their word. This is half a thousand cases a week. It is safe to assume that many if not most of the defendants who stream through that Court have been arrested before. Thus, if we make the charitable assumption (which, as we have shown, the record tends to bear out) that the Court applies its rule impartially in all cases which

come before it, the present case cannot be regarded as an isolated phenomenon. The brand of "justice" accorded to petitioner must also be meted out in a very large number of other cases.

In this connection it should be noted that the record contains no indication that the trial judge had any particular personal animus toward the petitioner. Had the Court been so inclined, it could have fined him $19.99 and jailed him for 10 days on each of the charges, without stepping outside its charmed circle of unappealability. (See Point II, *infra.*)

The picture of the Court which thus emerges is a more chilling one than if the record disclosed downright sadism or neurotic caprice. It is the picture not of an evil court, but of a court confident that its motives and methods are in conformity with the desires, or at least the best interests, of the community. In short, it is the picture of dispassionate, impersonal, systematic, *institutionalized* disregard for the law. And there is no reason to doubt that it is the picture not of one court alone but of many or all of the courts which, under the Kentucky statutes soon to be discussed, can insulate their rulings from review.

It should not be forgotten that it is in the police courts that most people get their first and only close look at the majesty of the criminal law. Not many of them will take appeals, even if they receive appealable sentences. Still fewer will bring their cases here.

There have been intimations that the Louisville Police Court should be indulged because of its heavy case load. That is presumably the point of respond-

ents' reference to the annual docket of 25,000 cases. The same notion may account for the prosecutor's indignation at the efforts of petitioner's counsel to obtain a full hearing and make a full record, which were criticized as an attempt "to make a big case out of a minor one" and "to make a federal case out of * * * this * * * two-bit case" (R. 31, 62). The contention seems to be that the Police Court's simple rule equating previous arrests with present guilt is the only way the docket can be cleared.

A narrow but sufficient answer is that it takes no more time to decide a case in accordance with the plain evidence than to decide it the other way. As a matter of fact, it often takes less. Each of the two trials reported in the present record should properly have ended in acquittal as soon as the arresting officer had stated the empty reasons for the arrest. And it would be interesting to know how many of the 25,000 cases disposed of each year would never come before the Court if the police were shown that unfounded charges would be dismissed.

A broader and better answer, however, is that the right to essential justice cannot be subordinated to administrative convenience. The Constitution does not permit. It has been well said that one man's red tape is another's due process. We do not suggest that a police court must observe the procedural niceties of a Federal District Court. But we do insist that, for the simple reason that it is a *court*, it can rightly be called upon to administer *law*, and to administer it with due regard for the minimum requirements of procedural fairness. *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (Mayor's Court).

II. Unappealable Police Court Judgments Are Not Subject to Any Mode of Review in the Kentucky Courts, Even Where Federal Constitutional Rights Have Been Denied. Such Denial of Corrective Judicial Process Vests the Police Court Judge With Absolute and Arbitrary Power.

It is an unusual and rather startling thing, in this day and age, to be confronted with arbitrary power in the original and primary sense of the term. Not infrequently this Court has been called upon to define and enforce the due process requirement of fundamental procedural fairness; and in so doing, it has prescribed certain minimum requirements, such as preservation of the right to counsel and exclusion of coerced confessions, without which grave injustice may be done even by courts which submit without reservation to the rule of law. But the Court has rarely had to deal with a claim that, in a limited but important class of cases, a state can reject the rule of law itself. That question is presented by this record.

Kentucky law empowers the judge of the Louisville Police Court to deal with persons who come before him in accordance with his own personal whim. He can ignore the procedural requirements of the Federal and state constitutions. He can disregard the rules of evidence. He can flout the substantive criminal law. He can adjudicate wholly innocent conduct to be criminal. And, having convicted an innocent defendant, he can fine and imprison him. So long as he does not exceed his territorial jurisdiction (the city limits) and does not entertain charges of offenses punishable

by more than $500 fine and 12 months imprisonment (KRS § 26.010), and so long as he imposes no sentence large enough for appeal, his decision will not be set aside by any Kentucky court.

This medieval state of affairs results from (a) the statutory limitation on appeals, coupled with (b) the denial of all other state court review of unconstitutional convictions in cases involving sentences too small to appeal. Either of these elements, by itself, might give rise to no constitutional objection. But together they spell arbitrary power.

The Kentucky statutes do not permit appeals from courts of limited jurisdiction in criminal cases unless the punishment exceeds a certain amount. The amount varies with the court. The decision of a county judge or a justice of the peace or of a police court in a city of the second, fifth or sixth class, is appealable if the sentence is for any imprisonment or for a fine of $20 or more (Criminal Code of Practice, § 362; KRS §§ 26.090 and 26.120). Different minima are prescribed for appeals from police courts in third and fourth class cities (KRS §§ 26.100 and 26.110).

Review of decisions of police courts of cities of the first class (of which Louisville is the only one) is regulated by KRS § 26.080, which is set forth at pages 5-6, *supra*. Under this statute a defendant who is fined as much as $20, or who is fined less than $20 and imprisoned for 10 days or more, can appeal.* Cases in-

*Construed literally, the statute would forbid appeal of a sentence of imprisonment (up to the jurisdictional maximum of 12 months established by KRS § 26.010) unless a fine were also imposed. But we have found no reported decision on this question, and recognize the possibility that an equitable interpretation might be adopted.

volving the legality of an ordinance can be reviewed regardless of the amount of the fine, the statutory writ of prohibition being available for this limited purpose. The statute forbids review in all other cases. The Kentucky Constitution empowers the legislature to determine the limits of appellate jurisdiction, and its failure to provide for appeals of fines less than $20 is binding on the courts. *Merson* v. *Muir,* 284 S. W. 2d 811, 812 (Ky., 1955).

This $20 minimum, incidentally, applies to each fine separately. Where two or more charges are tried together, the sentence on each one is considered separately in determining appealability. Thus, two $10 fines are not appealable though a single $20 fine would be. *Adams Express Co.* v. *Commonwealth,* 175 Ky. 825, 195 S. W. 109 (1917); *American Railway Express Co.* v. *Commonwealth,* 187 Ky. 241, 218 S. W. 453 (1919). Circuit Judge Lawrence S. Grauman and all seven judges of the Kentucky Court of Appeals have so declared. See Petition for Certiorari, Appendix B, pages 30, 35, 40.

Despite the limitation on appeals, the circuit courts have jurisdiction to issue common law writs of prohibition and habeas corpus to afford preventive and remedial relief where police courts and other inferior courts have exceeded their jurisdiction. See *Potter* v. *Trivette,* 303 Ky. 216, 197 S. W. 2d 245 (1946), and cases there cited. But in Kentucky, "jurisdiction" means simply jurisdiction over the parties and subject matter, and does not afford any remedy against violation of constitutional rights in the course of trial. See

Smith v. *Buchanan*, 291 Ky. 44, 163 S. W. 2d 5, 7 (1942):

> "We are aware that some opinions of some courts appear to hold that a denial to a litigant of some constitutional right renders the judgment void, but most courts take the opposite view and say that so long as the court has jurisdiction in the premises the matter complained of—although it be a denial of such constitutional guaranties—constitutes only an error correctible by appeal if the error appears in the record and the question is thereby presented to the Appellate Court."

To the same effect, see *Owen* v. *Commonwealth*, 280 S. W. 2d 524, 525 (Ky., 1955).

The only other possible avenue of redress in the state courts against constitutional violations not involving an excess of jurisdiction would be an application to the Court of Appeals for relief under Section 110 of the Kentucky Constitution, which confers upon that court "power to issue such writs as may be necessary to give it a general control of inferior jurisdictions." On its face, this provision seems to hold out a possibility of relief. But the Kentucky Court of Appeals, which has the final authority to interpret the Kentucky Constitution, has repeatedly and conclusively held that Section 110 affords no basis for relief from a criminal sentence which is too small to appeal.

The question was squarely presented in *Thompson* v. *Wood*, 277 S. W. 2d 472 (Ky., 1955), where Section 110 was held not to authorize relief from a $10 fine imposed by the County Judge (sitting as judge of

Quarterly Court) in a reckless driving case. The Court held that such relief was available only if it was necessary to prevent (a) great injustice and (b) great and irreparable injury; and that a $10 fine could not be a great and irreparable injury. The Court declared (at pp. 474-475):

> "Petitioner does not bring himself within that part of the rule to the effect that great and irreparable injury will be done him if the writ be not granted, since the only punishment inflicted, a fine of $10 and costs, is of such minor severity as that the Legislature did not believe it of sufficient importanee to provide for an appeal to the circuit court. Were this Court to intervene in such a situation as this, it would tend to turn this Court into a trial court to ascertain the guilt or innocence of those being tried in inferior courts."

In *Walters* v. *Fowler*, 280 S. W. 2d 523 (Ky., 1955), another original action for relief under Section 110, the petitioner, who had been arrested without a warrant along with 113 other people in a dragnet police operation and had been fined $5 for breach of the peace, claimed that the conviction violated his rights under the 14th Amendment due process clause as well as the state constitution. The Court refused to entertain his claims, holding that *Thompson* v. *Wood* was controlling and saying (at p. 524):

> "This result may seem harsh to the petitioner, and we are inclined to feel sympathetically toward him. However, the Legislature, in its wisdom, has not seen fit to authorize an appeal from a $5 fine.

> The proceeding used by petitioner is nothing more than an attempt to appeal from the judgment of an inferior court when no such appeal is authorized. The failure or refusal of the Legislature to provide for such an appeal is within its power and discretion. Lakes v. Goodloe, 195 Ky. 240, 242 S. W. 632.
>
> "For the reasons stated in Thompson v. Wood, *supra*, the writ of prohibition is denied."

The rule was adhered to in *Merson* v. *Muir*, 269 S. W. 2d 272 (Ky., 1954), 284 S. W. 2d 811 (Ky., 1955). The Louisville Police Court had fined the defendants $15.00 each for disorderly conduct "upon a plea of not guilty" *although no sworn testimony was offered*. Its judgment was held to be immune from review.

Thus, the Kentucky Court of Appeals, by adhering to the strict common law definition of jurisdiction, has first held the circuit courts powerless to redress due process violations in the police courts and like tribunals. And it has then closed its own doors to such cases on the ground that a man is not injured very much by being adjudicated a criminal, however unjustly, so long as he is not fined very much (or, presumably, imprisoned for very long). So far as the Louisville Police Court is concerned, the due process clause has thus been rewritten to read: "* * * nor shall any State deprive any person of life, of more than ten days of his liberty, or of $20 or more of his property, without due process of law."

In the stay proceedings ancillary to the present case, the Kentucky Court of Appeals foreclosed any possible doubt that, under the rule of *Walters* v. *Fowler*, this case is unreviewable on the merits by any Kentucky court. The Court of Appeals reaffirmed and restated the *Walters* rule, but said that the rule did not apply because the present defendant, unlike Walters, was not seeking state court review on the merits; he was only asking for a chance to bring his case to this Court. The Court of Appeals thus held that while a violation of the due process clause did not itself constitute great injustice and great and irreparable injury justifying relief under Section 110 from a fine too small to appeal, the threatened deprivation of the ancillary due process right to an *opportunity for a hearing* in this Court on the constitutional claims would constitute such injustice and injury as justified the granting of the stay. The Court of Appeals declared (Petition for Certiorari, Appendix B, pp. 38-39):

> "Appellee appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the Federal Constitution, *yet this substantive right cannot be tested* unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari. * * *
>
> "In Walters v. Fowler, Ky., 280 S. W. 523, appellant sought a writ of prohibition to prevent the collection of a $5 fine, averring that his right of due process under the Fourteenth Amendment

had been violated in the imposition of the fine and he would suffer great and irreparable injury unless the writ was granted, since he had no remedy by appeal. We denied the writ of prohibition and held that the imposition and collection of a $5 fine was not such great injustice or irreparable injury as would justify the granting of the writ. The distinction between that case and the instant one is Walters did not ask a writ of prohibition so he might go to the United States Supreme Court for its determination of whether or not he had been denied due process, while in the case at bar appellee seeks a stay of execution for that very purpose. *It is only* in extreme cases like the one at bar *where a person wants to go to the Supreme Court that we will interfere with an inferior court under § 110 when an unappealable fine has been imposed.*" (Emphasis added.)

The Court has thus said, as plainly as words can say it, that the most it can do for a man in petitioner's situation is to usher him into this Court. If he asks for relief from the conviction itself, as Walters did, he will fail.

Moreover, as pointed out at page 2 of our reply brief in support of the certiorari petition, it is clear that the Court of Appeals' failure to set aside the convictions did not result from the fact that petitioner had foregone the futile gesture of requesting it to grant such relief.* The Court *on its own motion* granted relief

*Even if relief under Section 110 had not been plainly unavailable, petitioner would not have been required to bring a separate collateral action for such relief before petitioning for certiorari to review the final and unappealable Police Court judgments. *Largent v. Texas*, 318 U. S. 418 (1943).

under Section 110 although petitioner had not asked it to do so but had instead sought relief through a different channel. Had relief on the merits been possible, there is no reason why it could not and would not have been granted instead. The Police Court judge, who would have been the respondent in an original proceeding under Section 110, was before the Court. If ancillary relief could be spontaneously granted under Section 110, as the Court did, there was no procedural obstacle to a similar grant of substantive relief.

The Court of Appeals, while expressly finding that the petitioner's Federal constitutional claims "are substantial and not frivolous," has thus held that no Kentucky court can hear those claims. In the words of the Court of Appeals, they "cannot be tested" unless access to Federal review is preserved. The Court of Appeals has thus rejected the principle announced in *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884):

> "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.' If they fail therein, and withhold or

> deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination."

See also *Mooney* v. *Holohan*, 294 U. S. 103, 113 (1935).

Petitioner has of course not sought review of the decision of the Court of Appeals in his case, since the relief he sought was granted. Strictly speaking, therefore, that Court's disclaimer of obligation to adjudicate federal constitutional claims of the type here involved may not be directly reviewable in this case. But its position is pertinent to the present discussion, since it shows, in the context of the present case itself, that Kentucky imposes no restraint whatever on police court action of the type here involved—no matter how arbitrary.

The foregoing review of Kentucky law shows that absolute and arbitrary power has been vested in the Louisville Police Court. By virtue of its complete power to keep its sentences below the appealable minimum, it can preclude any possibility of review by a higher state court. But this is not all. Not only does Kentucky law enable it to insulate its *judgments* from all attack, no matter how lawless they may be; it also enables it to insulate *itself* from the restraining influence which might be exerted by a public opinion aroused at the spectacle of unjudicial behavior. What makes this possible is the virtual abolition of the right to a jury trial.

Where the right to a jury trial is granted, and is honored by the court, two consequences follow. First, the jury can exercise its traditional function of protecting the citizen from oppressive official action. Second, and equally important, the formal separation of the legal and factual issues makes it necessary for the judge to articulate his legal premises. In his rulings on evidence and in his instructions to the jury on the substantive law of the case, the judge can hardly avoid disclosing whether he is applying or defying the law which is supposed to guide his rulings. Compare *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 431-432 (1935). Judicial defiance of the law would create an issue clear enough for review in the forum of public opinion, even though the particular defendant had no redress against it. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver,* 333 U. S. 257, 270 (1948).

But where there is no jury, the judge can and often does limit himself to the bare announcement of the sentence to be imposed. Without full review and analysis of the evidence, no outsider can form an opinion as to whether the law has been followed or not. And it is too much to expect that the press or the general public would undertake the labor of such review and analysis, or would have the background legal knowledge necessary for such a task.

To be sure, a grant of the *right* to a jury trial does not itself impose any legally binding restraint on

judges of Kentucky's courts of limited criminal jurisdiction. It has been held that they can, without fear of reversal, direct a jury to return a verdict of guilty (though the Court of Appeals has solemnly declared that the law does not permit it), or even refuse a jury trial to which the accused is legally entitled. Such an error is not deemed to be jurisdictional, and therefore affords no basis for reviewing a sentence too small to appeal. *Williams* v. *Pierson,* 301 Ky. 302, 191 S. W. 2d 574 (1945). But here again, defiance of the law by an official sworn to uphold it might at least create an issue sufficiently clear for the weight of public opinion to be brought to bear.

Except in the Louisville Police Court, Kentucky law keeps alive this possibility of public scrutiny by granting the right to a jury trial except for the most trifling offenses. In police courts of cities of the second to sixth classes, and in the county court, quarterly court, and justice of the peace courts, the existence of the right depends upon the severity of the *maximum possible* sentence. KRS § 26.400 (2), (3), (4), (5); Criminal Code of Practice, §§ 319 and 332. Thus, for example, in police courts of fifth and sixth class cities, the right exists wherever the punishment may be imprisonment or a fine of $16 or more. In no court is the right denied in cases where the penalty can be imprisonment or a fine exceeding $50—except in the Louisville Police Court.

In that court the test is not what the punishment *may be* but what it *turns out to be.* KRS § 26.400 (1) (*supra,* p. 6) provides:

"In cities of the first class, the police court shall try without a jury all cases involving the right to the custody and care of children. It shall not impose a penalty exceeding fifty days' imprisonment or a fine of one hundred dollars without the intervention of a jury, unless the right to a jury is waived by the accused."

Thus, no legal right of the accused is denied if he is put on trial without a jury for any offense within the court's jurisdiction (*i. e.*, offenses punishable by no more than $500 fine and 12 months imprisonment). Not until the end of the case does he learn whether he had a right to a jury. If at that time the judge sentences him to more than 50 days in jail, or imposes a fine of $100 or more, his right to a jury turns out to have existed—though of course this is a matter of academic interest only, since *Williams* v. *Pierson, supra,* holds that his only recourse is to take an appeal. If the sentence is too small for appeal, it is *a fortiori* too small for a jury trial, and the right to a jury trial has never come into being at all.

The statute has been held constitutional. *Houk* v. *Starck,* 251 Ky. 276, 64 S. W. 2d 565 (1933).

Under the circumstances, denial of a demand for jury trial in Louisville Police Court involves no unlawful conduct on the part of the judge. All the law does is to impose a meaningless *limit upon punishment* where a jury has been demanded and refused. Trials in that court are therefore heard by the judge alone, as trier of the law and the facts. The proceedings are informal, all parties and witnesses being sworn together,

and standing with counsel in a semi-circle in front of the bench as the testimony is given. The testimony is not taken down by the official court stenographer (except in felony examining trials, KRS § 26.310) unless the defendant employs him to do so. And, as stated in respondents' Brief in Opposition (p. 2) the judge does not write opinions to explain his rulings.

The power of the Louisville Police Court to impose small fines and jail terms is thus absolute. It is vested in a single official, unrestrained by the presence of a jury, whose premises of action need not be articulated and thus laid open to public view. The existence of such power negates the rule of law.

This Court, as the citadel of ordered liberty, has been ever vigilant to preserve the rule of law by curbing arbitrary official power whenever and however it has been asserted. At least since the adoption of the Fourteenth Amendment, the Court has uncompromisingly set its face against arbitrary state action in any form. The principle was stated in *Hurtado* v. *California*, 110 U. S. 516, 535-536 (1884):

> "*Law is something more than mere will exerted as an act of power.* It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial,' *so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,'* * * *." (Emphasis added.)

And the Court explicitly recognized its own role as guardian of the rule of law (*id.*, p. 536):

> "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. *The enforcement of these limitations by judicial process* is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." (Emphasis added.)

The principle was reaffirmed and enforced in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369-370 (1886):

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that *they do not mean to leave room for the play and action of purely personal and arbitrary power.* * * * the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (Emphasis added.)

And again, in *Leeper* v. *Texas*, 139 U. S. 462, 468 (1891), and *Maxwell* v. *Dow*, 176 U. S. 581, 603 (1900), the Court declared:

> "* * * due process is * * * secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Nor have those principles faded with the passing years. See, *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *In re Oliver*, 333 U. S. 257 (1948); *In re Murchison*, 349 U. S. 133 (1955).

The interdict upon absolute power applies to every agency of the state and its municipalities. It makes no exceptions for judges. This Court has explicitly declared that the requirement of due process is not "satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial." *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935). Arbitrary abuse of judicial power subjects the consequent judgment to reversal here. *Moore* v. *Dempsey*, 261 U. S. 86 (1923). Indeed, the judge himself is not protected by his office from personal accountability for judicial actions forbidden by the Fourteenth Amendment. *Ex parte Virginia*, 100 U. S. 339, 348-349 (1879).

In *Griffin* v. *Illinois*, 351 U. S. 12, 18-19 (1956), Mr. Justice Black said:

> "All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct

adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."

Perhaps he should have said that all the states *but one* have recognized the importance of appellate review. As we have shown, Kentucky has not only rejected *appellate* review of small sentences, but has withheld *all* review. The result has been to make the Louisville Police Court a little enclave of arbitrary power. The United States Constitution forbids.

III. An Arbitrarily Wrongful Criminal Conviction Is Not Rendered Constitutional by the Imposition of a Small Sentence.

The Kentucky Court of Appeals has held that due process objections to a criminal conviction are not justiciable in Kentucky if the ensuing sentence is a $10 fine. The stated basis for this position is that in such a case no "great and irreparable injury" has been sustained. Let us examine this proposition.

Even if the only harm inflicted upon petitioner by the two convictions had been the two $10 fines, he would have standing to claim the protection of the due process clause. Twenty dollars is not a lot of money, but to a man whose weekly earnings often do not exceed $12 it is by no means *de minimis*.*

*Petitioner also paid a $25 attorney fee for representation at each of the trials (R. 70).

This Court has not hesitated to set aside, on due process grounds, a $10 fine imposed by the Police Judges Court of San Francisco for violation of an ordinance of that city. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). If the *Yick Wo* case was not too small to justify the attention of this Court, petitioner's case should not be too small for the Kentucky Court of Appeals.

Moreover, the fines are subject to indefinite multiplication. If no evidence is needed for conviction, there is no limit to the number of charges which can be brought. As is shown in Point IV of this brief, the Louisville police have in effect been licensed to arrest the petitioner at will. Unless this Court intervenes, he can look forward to an indefinite series of groundless prosecutions.

The fines, however, are only a small part of the harm done to petitioner. A conviction of crime, even if the sentence is nominal or suspended, is itself an injury. Criminal status may close the door to employment prospects, to credit extension, to a whole variety of future opportunities. It can also affect the sentence to be imposed in later cases, where the defendant need not even be told that the sentencing court is taking the prior convictions into account. *Williams* v. *New York*, 337 U. S. 241 (1949). Indeed, as noted above, the record shows that in this very case petitioner has been convicted because of his prior arrests.

The present record does not show how many of those arrests resulted in convictions, or how many of the convictions were unsupported by any evidence of guilt. It does however show that *one* prior arrest (the January 14 arrest) was illegal, and that *one* prior conviction (the January 20 conviction) was without legal foundation. For all that appears, the others may have been equally groundless. For all that appears, any prior convictions may have resulted only in fines or jail terms too small for appeal. But they have had their effect. It will not do to say that a small sentence deprives a criminal conviction of its essential sting.

We have thus far examined only the material consequences of convictions and sentences such as these. Beyond this, and on a level of deeper and more universal significance, is the harm which is suffered from injustice itself. The time has not yet come when Americans can be dealt with as economic men. Their needs and their rights are not measurable in purely monetary terms. One of their needs is justice, and in this country they have a legal right to receive it.

It is the bald denial of *justice* which is the matter of constitutional concern, not the $10 mulcts as such. A state court can deprive a man of a million dollars, or of life itself, without creating an issue for this Court. It is the denial of *due process* that gives rise to the Federal question.

We hold that justice is a real thing having an objective existence and knowable attributes. It is the solvent which converts raw power into morally binding law. The courts are privileged to seek it and to define

its meaning in particular contexts, but they are powerless to alter its substance.

There are cases where the pursuit of justice is a complex matter, and reasonable judgments may differ as to where it leads. But there are also cases—and this is one of them—where even a simple man can know that justice has been denied him. And that knowledge is a grievous hurt.

The hurt done by a denial of justice is not easy to describe, but it is nonetheless real. A man's sense of innate dignity, his conception of himself as a person unique yet part of a community, his feeling of proud security in the impartiality of the law—impairment or destruction of these values cannot be measured in money. Yet such a hurt can shatter a man. And that is the hurt which is done when justice is denied.

If there be anyone who doubts it, let him look at these two trials through a defendant's eyes. Let him then consider whether *he* could measure in money the injury done him by the injuries which appear in this record; and let him consider further whether his injury would be any the less because the *additional* injury inflicted by the sentence was relatively small. In addition to the more comprehensive injustices which are discussed elsewhere in this brief, let him consider these specific actions of the Court:

(1) On January 14 petitioner was arrested in a bus station without a warrant on charges of vagrancy and loitering, and on January 20 he was brought to trial. The prosecution introduced no evidence of any

criminal conduct. The sole prosecution witness, one of the arresting officers, said (R. 37):

> "I smelled wine on this man's breath (indicating the defendant Thompson) and I charged Thompson with vagrancy and loitering *because he didn't give me any proof as to working anywhere.*"

No law forbids the drinking of wine. No law requires a man to carry proof of employment. No law requires a man to answer a police officer's questions. (Even the loitering ordinance refers to persons who "*cannot* give a satisfactory account of * * * themselves," not those who *do not.*)

Plain justice required that the charges be dismissed on the basis of the officer's own statement of the reasons for the arrest. A motion to dismiss was overruled (R. 44).

(2) At the January 20 trial, before petitioner had testified, the prosecution offered evidence of previous arrests. (The Court later said this evidence was decisive.) Every lawyer knows that such evidence, since it has no tendency to prove any material fact, is inadmissible as affirmative proof of guilt. Even a *conviction* of *felony* cannot be proved except for impeachment purposes, and does not become admissible until after the impeachable witness has testified.

Plain justice required exclusion of the evidence. But petitioner's objection was overruled (R. 40).

(3) At the same trial petitioner then affirmatively showed, by the uncontradicted testimony of himself and two disinterested witnesses, that he was in the bus

station for the legitimate purpose of catching a bus; that he had told the arresting officers so, and had thus given a "satisfactory account of himself"; that he had regular employment—"visible means of support"; and that the implied consent to his presence at the bus station (where he had been only five minutes and thus could hardly have been "loafing") had not been withdrawn by the owner or controller of the premises. He thus disproved each of the three elements of the offense of loitering.

Plain justice required a dismissal of that charge. But he was told that his previous arrests rendered him guilty (R. 62).

(4) Believing that a more careful review of the evidence might persuade the Court of its error, petitioner through his counsel asked leave to file a brief on the basis of the transcript. No great delay would have resulted, and (as is shown elsewhere in this brief) the consequences of an erroneous decision were potentially serious.

Plain justice required that defendant be permitted to assemble the pertinent legal authorities. The request was denied (R. 62).

(5) There was no evidence of vagrancy, and petitioner introduced uncontradicted evidence that he had not violated any of the four branches of the vagrancy statute (KRS § 436.520). He proved that he had "an occupation at which to earn an honest livelihood"; that he had "visible means of support"; that, being unmarried, he had not "deserted his wife or children";

and that he did not "habitually refuse to work." Indeed, the Court's offer to file that charge away (R. 63) amounted to a *finding* that there was no proof of vagrancy; for if guilt had been proved, the Court's clear duty was to say so.

Plain justice required that the vagrancy charge be dismissed, and petitioner so moved. Without hearing any further evidence, the Court found petitioner guilty of vagrancy (R. 63-64).

(6) Petitioner was offered and accepted appealable sentences, perfected his appeal forthwith, and was released on bond (R. 70). Four days later, on January 24, he was arrested in the Liberty End Cafe. He was tried and convicted February 3. The evidence has been analyzed at pages 15-22, *supra*, and the plain injustice of the convictions has been shown. Here again the previous arrests were evidently decisive.

(7) In the course of the second trial, after officer Lacefield had stated the reasons which had led him to arrest petitioner for loitering, the Court on its own motion suggested a further reason for the arrest—that petitioner was "dancing" in a place not licensed for dancing (R. 9). No law forbids such dancing, and petitioner was not charged with violating any such law. Plain justice forbade the injection of such a charge into the case.

(8) Later in the trial, petitioner detailed his income and expenses to show "visible means of support" (R. 17-18). The judge claimed "judicial knowledge" of facts as to other expenses, of which there was no

evidence, and ignored an objection (R. 18). The rules of evidence cannot conceivably be stretched to permit judicial notice of such facts; and if a judge sitting as trier of the facts has personal knowledge of matters pertinent to the case, plain justice requires him to disqualify himself just as a juror must do.

* * * * *

Returning now to the question whether petitioner has suffered a deprivation over and above the fines and the other material consequences of his convictions, we say that he has been robbed of access to equal justice under law, which is the common birthright of every American. He has been shown that no "hearing" is available, in the meaningful sense of the term, because the evidence and arguments adduced on his behalf are disregarded as completely as if they had not reached the judge's ears; for him, a trial is but a formal prelude to a foreordained result. He has been put outside the law.

These are not trivial hurts. Such hurts as these are not comprehended in or measured by the $10 fines. Such hurts as these, visited upon millions of freedmen, led to the adoption of the Fourteenth Amendment. It is to heal such hurts as these that the due process clause exists.

IV. "The Security of One's Privacy Against Arbitrary Intrusion by the Police," and the Right to Retain Counsel and Demand a Trial on Criminal Charges, Are Guaranteed by the Fourteenth Amendment Due Process Clause. Those Freedoms Are Abridged by the Arbitrarily Wrongful Convictions in This Case.

We have shown, we think, that the injury directly resulting from the convictions and sentences themselves is by no means trivial. But there is more. We shall now show that the Police Court judge has in effect licensed the Louisville police to arrest petitioner at will, and to take reprisal upon him for resisting a previous unfounded criminal charge by retaining counsel and demanding a trial.

This is made possible by a restriction imposed by Kentucky law on actions for false arrest and malicious prosecution. Kentucky follows the generally accepted rule that an action for malicious prosecution cannot be brought unless the prosecution has terminated in favor of the accused. See *Van Arsdale* v. *Caswell*, 311 S. W. 2d 404, 406 (Ky., 1958):

> "It is well settled in this state that before a suit for malicious prosecution may be maintained, the plaintiff must aver and prove the action alleged to have been maliciously prosecuted has finally terminated in his favor, which is a condition precedent to the maintenance of an action for malicious prosecution. Conder v. Morrison, 275 Ky. 360, 121 S. W. 2d 930; Central Acceptance Corp. v. Rachal, 264 Ky. 849, 95 S. W. 2d 777. See annotation, 135 A. L. R. 793; 34 Am. Jur.,

'Malicious Prosecution' (1957 Pocket Supplement) § 31, p. 90."

Consequently, by convicting a defendant and imposing upon him a sentence which cannot be reviewed, the Police Court can forestall the civil action.

The danger of civil liability is the only effective deterrent to arbitrary police action in such situations as this. The sanctions of the criminal law are within the control of the public authorities, not private complainants. If petitioner were to swear out a warrant charging officer Lacefield with the crime of unlawful arrest (KRS § 435.150), the case would be heard in Louisville Police Court, sitting either as a misdemeanor trial court or as a felony examining court. If petitioner by some means were to seek direct grand jury action, he could do nothing without the aid of the County Attorney or the Commonwealth's Attorney except to appear alone at a secret grand jury hearing and give his version of the facts. The grand jury would then privately hear such other witnesses (including the police officers) as they or one of the said prosecutors should desire to call. It would be almost laughable to suggest that a lay grand jury would have either the inclination or the ability to pass upon the correctness of the Police Court decision. But unless they did so, and found that the convicted defendant in the Police Court case was in fact innocent, they would have no basis for an indictment of the police officer.

It might be thought that even if an unappealable Police Court conviction thus closes the door to a civil trial of the maliciousness of the *prosecution,* it leaves open the question of the legality of the *arrest*—for of course the adjudication of guilt is not a determination that the arrest was legal. Even a guilty man may be wrongly arrested. Thus, if petitioner were able to sue for false imprisonment, the danger of civil liability might be an effective deterrent to arbitrary arrest without a warrant; all the police could do with impunity would be to harass him with repeated accusations initiated by citation rather than arrest. Although he might thus be subjected to considerable annoyance, attorney fees and small criminal sentences, he would at least be able to walk the streets as a free man, untouched by the constant fear that he would be captured and held for ransom.

In most states the unreversed Police Court conviction would not bar a false imprisonment action. 22 Am. Jur., tit. "False Imprisonment", § 29; Annotation, 25 A. L. R. 1518. Kentucky, however, departs from this general rule. In Kentucky it has long been settled that in a false imprisonment action, even though favorable termination of the criminal proceeding need not be *pleaded* (*Southern Railway Co.* v. *Shirley,* 121 Ky. 863, 90 S. W. 597 (1906)), the defendant can establish a complete defense by proving an unreversed conviction. *Barger* v. *Cook,* 9 Ky. Op. 584 (1877); *Griffin* v. *Russell,* 161 Ky. 471, 170 S. W. 1192 (1914); *Waddle* v. *Wilson,* 164 Ky. 228, 175 S. W. 382 (1915).

Thus, an unappealable Police Court conviction deprives the accused of all civil redress. And this deprivation is effected in a proceeding where the legality of the arrest, as such, is ordinarily not even an issue on which evidence can be offered. Unless the Police Court is called upon to determine the admissibility of evidence seized in a search incident to a questioned arrest, evidence that the arrest is illegal would be irrelevant to any material issue.

The unusual Kentucky rule restricting false imprisonment actions raises an interesting due process question as to the legality of summary arrest. Due process requires that some effective procedure be provided for redress against abuse of that fearsome power. This Court has upon occasion upheld summary official action, taken without prior notice and opportunity for hearing; but in each such case the validity of the action was upheld solely because judicial review on the merits was available at some later time. See *Lawton* v. *Steele*, 152 U. S. 133, 142 (1894); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306, 315-320 (1908), quoting with approval the opinion of Holmes, J. in *Miller* v. *Horton*, 152 Mass. 540, 26 N. E. 100 (1891). And when such review on the merits is not available, due process is held to have been denied. *Southern Railway Co.* v. *Virginia*, 290 U. S. 190, 197 (1933).

The Kentucky Court of Appeals has recognized the importance of granting redress against the malicious abuse of other summary process. In *Goode* v. *Commonwealth*, 199 Ky. 755, 758, 252 S. W. 105 (1923), it held that a search warrant should issue only upon

an affidavit in such form as to expose the instigator to a civil action if he has acted maliciously. Presumably the same rule would apply to an arrest warrant. But where the arrest is without a warrant, Kentucky law affords no hearing on its legality if defendant is found guilty and given an unreviewable sentence in Police Court, unless he happens to have a hearing in that Court on the legality of a search—an issue not raised in the present case.

Thus, by arbitrarily and wrongfully convicting the petitioner the Louisville Police Court has not only subjected him to the $10 fines and the other hurts discussed in Point III of this brief. It has also denied him all redress against arbitrary and malicious arrest.

The convictions therefore deprive petitioner of his liberty without due process of law. By denying him all effective redress against wrongful arrest, they expose him to the unrestrained will of the police. If it be suggested that the objection goes to the legality of the *arrest* rather than the validity of the *judgments,* the result is the same; for the Police Court acquired jurisdiction of petitioner's person only by virtue of the arrest, and the illegality of the arrest would therefore render his convictions void.

In addition to denying redress against these particular arrests, the convictions have a broader effect. As has been noted (*supra,* p. 26) the Police Court has acted on the basis of a *rule*—the rule that previous arrests preclude acquittal. Presumably the existence of such a rule would quickly become known to the police from simple observation of the Court's rulings,

even if it were not spelled out for them. In this case, however, it has articulated the rule in unmistakable terms. If the police did not know the rule before petitioner's January 20 trial, they learned it then. And four days later, in the Liberty End Cafe, they used the power which the Court had confirmed to them.

It will hardly be contended that the Police Court judge and the police are unaware of the Court's power to protect the arresting officers from civil actions, or that the Court does not take the possibility of a civil action into account in arriving at its decision. The Court's willingness to file away the vagrancy charge but not to dismiss it can be explained in no other way.

The practice of filing away rather than dismissing unproved charges has been developed as a means of enabling the Police Court to accomplish two apparently inconsistent results—to grant leniency to an innocent defendant without terminating the case and thus opening the way to a civil action. The practice was brought to the attention of the Court of Appeals in *Van Arsdale* v. *Caswell, supra,* where an accused person whose case had been filed away had sued for malicious prosecution. The Court was urged to hold that filing away is a termination of the prosecution favorable to the defendant. An opposing brief *amicus curiae* was submitted by the Louisville Police Officers Association, affirming the Police Court's right to forestall civil actions in this way. The Court declined to accept this contention, saying (311 S. W. 2d at p. 407):

> "The amicus curiae brief of the Louisville Police Officers Association vigorously argues trial

courts are justified in 'filing away' a warrant or indictment as if protects citizens and police officers from suits for malicious prosecution, since such an order indefinitely continues the case and prevents a final determination thereof. The answer to that argument is that the mere termination of a criminal prosecution does not give the defendant therein a right of action for malicious prosecution. He must allege and prove that he has been accused of a crime without probable cause."

But the Court of Appeals declined to hold that filing away is a termination of the criminal case. All it did was to announce that the defendant had a right to object to the filing away, and that if the Police Court then refused either to try the case or to dismiss it, the filing away would be a final order for purposes of appeal. The present case shows that this is an empty remedy. The only result of an objection to the filing away is to incur an otherwise avoidable conviction (R. 63-64).

The record contains other indications too that the possibility of a civil action in the event of acquittal has not escaped attention. That possibility always exists, of course; but when the defendant in a misdemeanor case follows the unusual course of employing the official reporter to record the evidence, and when defense counsel then cross-examines the arresting officer in such a way as to explore the full circumstances of the arrest, the possibility is emphasized. That is the meaning of the prosecutor's odd suggestion at both trials that petitioner's counsel was trying to "intimidate" the officer (R. 9, 63).

The January 20 trial showed petitioner that his arrest record would prevent his acquittal of any later charge, at least unless he proved something more than his innocence. And the Court obviously had the *power* to preclude a civil action in this way. But without conceding that it was lawful for the Court thus to prejudge the question of false arrest, which is theoretically a matter for determination by a civil court sitting with a jury, petitioner thought it possible that if he could not only prove his innocence but *also* could convince the Court that the two arrests were malicious in fact, and indeed represented an attempt to punish him for making use of the Court's own processes, the Court might decide to open the way to a civil action.

Petitioner therefore offered to prove that the January 14 arrest had been made in reprisal for his action in retaining counsel and demanding trial on an earlier disorderly conduct charge, which had since been filed away. The avowal was specific and detailed (R. 69-70), but the offer of proof was rejected (R. 20). In addition, he showed through the testimony of Mr. Marks, the cafe manager, that one of the officers who made the January 24 arrest had known of the previous incident in the bus station and had referred to it just before arresting petitioner (R. 26)—evidence which, in the light of the facts stated in the avowal and the absence of any real reason for arresting petitioner in the cafe, clearly tended to show the existence of a connected plan. Officer Lacefield's denial of any prior knowledge of the bus station arrest (R. 11) does not

contradict Mr. Marks' testimony as to what officer Barnett had said.

Having thus offered evidence that the arrests had resulted from wilful malice, petitioner's counsel requested an opportunity to argue the case on the basis of the transcript (R. 31).

This would have given an opportunity for argument of the Federal questions here presented, which had been raised on two motions for dismissal (R. 13, 30, 33, 71). The request was denied.

The only apparent result of petitioner's effort was that he was given unappealable instead of appealable sentences. Thus it would seem that the explicit request for access to the civil courts simply hardened the Police Court judge's determination to deny such access.

By rejecting this last possible effort of petitioner to obtain relief from its rule that previously arrested defendants will not be acquitted, the Police Court judge has informed the police in unequivocal terms that they can with impunity arrest petitioner whenever they see him. He has granted them a hunting license. The Police Court's arbitrary power to impose small fines and jail terms has thus been so used as to enable the police to exercise arbitrary power of their own over petitioner's very right to walk the streets of Louisville and enter its places of public accommodation.

This extension of arbitrary power beyond the limits to which it was nominally confined by the appeal statute is not unprecedented, or even a cause for astonishment. Arbitrary power, once established, tends to proliferate like a cancer. This Court has developed the doctrine of

unconstitutional conditions to deal with other aspects of this phenomenon. *Blake* v. *McClung*, 172 U. S. 239 (1898) (privileges and immunities, Art. IV, § 2); *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (1922) (removal to Federal courts); *Frost* v. *Railroad Commission*, 271 U. S. 583 (1926) (due process); *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490 (1927) (equal protection).

The hunting license granted to the police is not limited to the hunting of petitioner. This record discloses the nature of the general police practices which have grown up under the umbrella of the existing legal situation. Officer Suter, who arrested petitioner on January 14, and officer Lacefield, who arrested him on January 24, testified that the arrests were made in the course of a "routine check" or "fair check" of places of public accommodation (R. 2, 36). What this really means, as the testimony at the first trial shows in some detail (R. 59), is that the police enter such places as restaurants and bus stations and, without search warrants or arrest warrants, require whomever they please to account for their presence, show proof of employment, and otherwise explain their circumstances. If the explanation is unsatisfactory to the arresting officer an arrest is made and petty charges filed.

Such police methods are alien to our institutions. They constitute a standing threat to the freedom and privacy of all. And it is no longer open to doubt that the due process clause forbids a state to confer arbitrary power upon the police. See *Wolf* v. *Colorado*, 338 U. S. 25, 27-28 (1949):

"The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

See also *Irvine* v. *California*, 347 U. S. 128, 132 (1954).

The gravity of the situation would be plain enough if the case involved only a dispassionate effort on the part of the police to prevent persons whom they considered undesirable from frequenting public places. But this case involves an even broader incursion upon the common right. This petitioner has been twice arrested and prosecuted not because of any diffuse attitude of official disapproval but for the specific reason that he retained counsel and demanded trial on a previous unfounded charge. To deny him all possibility of redress against such reprisal is to eviscerate the rights which lie at the very core of due process.

That the Fourteenth Amendment due process clause guarantees the right to counsel and the right to a hear-

ing is too well settled for argument. *Powell* v. *Alabama,* 287 U. S. 45 (1932); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 (1930). The existence of a Federal right necessarily implies a Federally protected immunity against harassment, reprisal or punishment for exercise of that right. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819); *Johnson* v. *Maryland,* 254 U. S. 51 (1920), and cases there cited; *N. A. A. C. P.* v. *Alabama, ex rel. Patterson,* 357 U. S. 449 (1958). Such reprisal in the present case consisted not only of the arrests and fines themselves, but also of necessary expenses for bail bonds and attorney fees which taxed the petitioner's slim resources to the utmost (R. 69-70).

The foregoing discussion shows that the essential issue in the present case is not the validity of the ordinances under which petitioner has been prosecuted, but the arbitrariness of the judgments. It actually makes no difference at all what ordinance or statute the petitioner is accused of violating. So long as his arrest record rather than his conduct is the basis of his convictions, little can be accomplished by an attack on the particular ordinance or statute which is the formal but not the actual reason for the prosecution. There would always be another ordinance or statute which could be made the excuse for a new criminal charge.

It cannot be rightly contended that these due process violations are chargeable solely to the police and do not infect the court action here under review. The judgments of conviction are the essential means

whereby the police have been invested with arbitrary power and immunized from liability for its wrongful exercise. The punishment which those judgments inflict is an expected consequence of the illegal January 24 arrest, and thus is a portion of the intended reprisal. It has long been settled that a judgment which perfects and implements an unconstitutional action of state officials is itself reversible. For the Louisville Police Court is not only bound to avoid participating in violations of the United States Constitution, but also has an affirmative obligation to redress such violations. As was held in *Neal* v. *Delaware*, 103 U. S. 370, 397 (1880):

> "The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States. * * * Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning."

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgments of the Police Court of Louisville entered February 3, 1959, should be reversed.

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BRIEF FOR

LOUISVILLE AND

WEALTH OF K

THE CITY OF

ND THE COMMON

CENTUCKY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 59

SAM THOMPSON, - - - - - - Petitioner,

vs.

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - Respondents.

On Writ of Certiorari to the Police Court
of the City of Louisville.

BRIEF FOR THE CITY OF LOUISVILLE AND THE COMMONWEALTH OF KENTUCKY.

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October, 1959.

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IN THE

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No. 59

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BRIEF FOR THE CITY OF LOUISVILLE AND THE COMMONWEALTH OF KENTUCKY.

OPINIONS BELOW.

The court below issued no opinion, but its judgments are set forth at R. 75-77.

JURISDICTION.

The judgments of the court below (R. 75-77) were entered on February 3, 1959. The petition for a writ of certiorari was filed on May 1, 1959, and granted on June 22, 1959 (R. 81). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

STATUTES AND ORDINANCES INVOLVED.

The pertinent provisions of the Louisville General Ordinances (§§ 85-8, 85-12, 85-13, 61-25(a), 61-46, 61-55, 67-15, 67-18, 67-39) and of the Kentucky Revised Statutes (§§ 26.010, 26.080, 95.150, 244.080, 244.120) are set forth in the Appendix, *infra*, pp. 23-28.

QUESTIONS PRESENTED.

Section 85-12 of the Louisville General Ordinances provides in relevant part that no person, without *visible* means of support *or* unable to render a *satisfactory* account of himself, shall loaf or loiter "along . . . the public . . . thoroughfares"; nor shall such a person "loaf, or trespass in or about any . . . building" without the owner's consent.

The Louisville Police Court, having exclusive jurisdiction over the enforcement of ordinances, has construed these ordinances (pursuant to the legislative intent to forbid loitering or loafing "along", or at the side of, city streets and walks) to include public places situated at the side of these public ways, such as bus stations, saloons, and parking lots. Such activities on premises which are not "public places," are not forbidden, provided the owner or controller has expressly consented to them.

The questions presented are:

1. Whether the evidence was sufficient to support the convictions, and therefore meets the requirements

of the due process clause of the Fourteenth Amendment.

2. Whether the failure of the state to provide appellate review of constitutional claims arising out of misdemeanor convictions involving fines of less than twenty dollars, violates the due process clause of the Fourteenth Amendment.

3. Whether convictions with small and non-appealable fines deny a person all possibility of effective redress against illegal and arbitrary arrests, and thereby violate the due process clause of the Fourteenth Amendment.

4. (a) Whether in the case before this Court there is sufficient evidence of reprisal for petitioner's insistence on retaining counsel and demanding a hearing.

(b) Whether frequent convictions for misdemeanors involving non-appealable fines must be interpreted as being reprisals for retaining counsel and demanding a hearing in violation of the due process clause of the Fourteenth Amendment.

STATEMENT.

On January 24, 1959, the petitioner was arrested in a public place, a tavern, for violating the loitering ordinance (R. 2) by: (1) loitering or loafing in a public place—a tavern—along a city thoroughfare; and (2) trespassing or loafing, *i. e.*, dancing, in a building without the express consent of the owner or controller, where such dancing was prohibited by law.

Upon being informed of his arrest and the nature of the charge, the petitioner became unruly, resulting in a disorderly conduct charge (R. 3).

Both the loitering charge and the disorderly conduct charge were heard in the Louisville Police Court on February 3, 1959, where the petitioner was found guilty and fined ten dollars on each charge (R. 75-77). The fines were not paid, making it mandatory for him to serve them out at the rate of $2.00 per day, or a total of ten days in jail.

Claiming that his Constitutional rights were violated, with no existing remedy of appeal, the petitioner obtained a stay of the judgments (R. 75-79) and filed a petition for a writ of certiorari to issue from this Court (R. 81).

We believe it only fair to the Court to point out that petitioner's Statement (Pet. Brief, p. 9 through second paragraph, p. 10) concerns two cases, not before it, of a trial on January 20, 1959 (R. 35). All that is properly a part of the record in the cases before this Court is the testimony of Dr. Wynant Dean (R. 34). The remainder of the proceedings were not stipulated. Therefore, neither the first few pages of the Statement, nor pages 31-44 and 47-64 of the Record, are properly before this Court.

SUMMARY OF ARGUMENT.

I.

The findings of the police court that the petitioner had violated both the loitering ordinance and the disorderly conduct ordinance were based on sufficient evidence. There is no merit to the petitioner's contention that there was a complete failure of proof, and that the evidentiary conflicts are not in issue.

Even if it could be successfully argued that the police judge accorded undue weight to the Commonwealth's evidence, rather than to the evidence of petitioner, as to the charge of loitering, the *arrest* on the loitering charge was nevertheless valid and the ensuing disorderly conduct charge is supported by sufficient evidence.

II.

The absence of appellate review in Kentucky, in cases where small fines are levied, is not unique. On the contrary, it is one of the historic facets of Anglo-American law. Until comparatively recent times, there was no appeal from *any* criminal conviction.

III.

It is plainly conjectural to argue that Kentucky affords no redress against arbitrary arrests which result in non-appealable convictions, when that question was never raised below, and the state's highest court has never been given the opportunity to rule on the question.

IV.

There is no merit to petitioner's contention that his arrests were reprisals for retaining counsel and demanding a hearing. The appearance of counsel is the rule, rather than the exception, in cases pending before the Louisville Police Court which are not traffic violations.

ARGUMENT.

I. Petitioner's Convictions Were Supported by the Evidence.

The loitering ordinance, § 85-12 of the Louisville General Ordinances, provides in part (App. A, p. 25):

> "It shall be unlawful for any person or persons, without visible means of support, or who cannot give a satisfactory account of himself, herself, or themselves, to loaf, congregate, or loiter upon, along, in or through the public streets, thoroughfares, or highways of the City of Louisville, or for such person or persons to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building; . . ."

The Louisville Police Court has exclusive jurisdiction over all offenses arising under the city ordinances. § 26.010 of the Kentucky Revised Statutes (App. A, p. 26). It has construed § 85-12, *supra*, to forbid loitering "along," or at the side of, public thoroughfares, as well

as "upon . . . in or through" public ways. Loitering in public places "along" the thoroughfares, under this construction, falls within the prohibition of the act. In Kentucky, a "combined beer tavern and restaurant is a public place." *Ginger* v. *Commonwealth* (1953), Ky., 262 S. W. 2d 179.

As to loafing on premises which the law does not classify as a "public place," the Police Court has properly construed this section to mean that a person who enters premises for any purpose other than that for which the general public is invited, must obtain the consent of the owner or controller. This consent must be express. One cannot claim the immunity of an implied consent to be on the premises, when he has entered with a surreptitious purpose contrary to that for which the public is invited.

The reason for the foregoing construction is obvious. It covers those situations where loiterers wander off the streets and into parking lots, theater lobbys, saloons, and other public places, with no legitimate purpose at hand. This Court has demonstrated that where the evil sought to be prevented is apparent, a reasonable construction of the language employed is justified. *United States* v. *Walter* (1923), 263 U. S. 15, and such a construction by a state court should be respected. *Elmendorf* v. *Taylor* (1825), 23 U. S. (10 Wheat) 152, 159; *Shelby* v. *Guy* (1826), 24 U. S. (11 Wheat) 361, 367.

The regulation of loitering and vagrancy in public places (including buildings) is a common practice, e. g., *Ex Parte* Strittmatter (1910), 58 Tex. Crim. 156,

124 S. W. 906, 907; *King* v. *State* (1914), 74 Tex. Crim. 658, 169 S. W. 675, 677; *Robinson* v. *State* (1916), 15 Ala. App. 29, 72 So. 592; *Williams* v. *District of Columbia* (1949), D.C., 65 A. 2d 924, 926; and is a valid exercise of the police power. *Phillips* v. *Municipal Court of Los Angeles* (1938), 24 Cal. App. 2d 453, 75 P. 2d 548, 549; *City of Toledo* v. *Wagner* (1937), 57 Ohio App. 160, 13 N. E. 2d 136, 138; *State* v. *Starr* (1941), 57 Ariz. 270, 113 P. 2d 356, 358; *People* v. *Parker* (1955), 208 Misc. 978, 138 N.Y.S. 2d 2, 8, 9; Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L. J. 1351 (1950).

The Louisville police have "all the common law and statutory powers of constables, . . ." KRS 95.150(1) (App. A, p. 27). § 36(2) of the Kentucky Criminal Code (App. A, p. 28) provides that a peace officer may make an arrest *without a warrant* when a public offense is committed in his presence. Of course, a policeman is a peace officer. *Elam* v. *National Surety Co.* (1923), 201 Ky. 74, 255 S. W. 1039, 1041. Peace officers at common law could arrest without a warrant and in lieu of statute, *inter alia*, to prevent an imminent breach of the peace. In addition, there were a few exceptional cases of misdemeanors for which a peace officer could arrest without a warrant on suspicion largely, as suspicious nightwalkers, streetwalkers, and vagrants. *Wheelhorse's Case*, Poph. 208, 79 Eng. Rep. 1297 (K. B. 1627); *Rex* v. *Bootie*, 2 Burr. 864, 97 Eng. Rep. 605 (K. B. 1759); *Lawrence* v. *Hedger*, 3 Taun. 14, 128 Eng. Rep. 6 (C. P. 1810).

Thus, the police have the power to make arrests for violations of the loitering ordinance anywhere they see such violations taking place. It will not be necessary to argue the authority of the police to make arrests for violations in their presence even if they are *unlawfully on the premises, Ex Parte Ajuria* (1922), 57 Cal. App. 667, 207 P. 515, because in this case, § 61-25(a) of the Louisville General Ordinances (App. A, p. 23) makes the condition that every person licensed by the City to sell alcoholic beverages consents to the entry of the police at all reasonable hours for the purpose of inspection and search. Cf. *Marron* v. *United States* (1927), 275 U. S. 192, 198.

In summary, the police could—and did—arrest the petitioner on either of two grounds:

1. Loitering or loafing in a public place along a public thoroughfare; or

2. Loafing or trespassing in premises (whether or not a public place) without having first obtained the express consent of the owner or controller.

As the evidence clearly shows, the police entered the tavern for the routine inspection (R. 2) authorized by § 61-25(a) of the city ordinances. (App. A, p. 23). They discovered that the petitioner had purchased nothing and had been there for over a half hour (R. 2, 25, 26). The only evidence that petitioner had purchased anything was the testimony of the petitioner himself, and he could not—or would not—even say whether a man or a woman made the sale (R. 19)! The petitioner's reason for being there was to wait for

a bus (R. 2), although he confided at the trial that he didn't know what time the bus was due (R. 23) and demonstrated that fact by testifying that it was due at 7:15, when in fact in was *not* due then (R. 23). Moreover, none of the busses went near the front of the tavern (R. 2) because it is situated on a one-way street going west over which no busses travel, while the petitioner's busses travel east. It was around 6:40 when the officers questioned the petitioner (R. 24). The next bus was not due for nearly an hour, but since the petitioner didn't know what time the bus was due (R. 23)*, he obviously didn't intend to catch a bus.

These facts are strong evidence that the petitioner was in fact loitering or loafing in a public place along a public thoroughfare, and the officers were justified in making this arrest on the basis of the first part of the loitering ordinance alone. *Giannini* v. *Garland* (1944), 296 Ky. 361, 177 S. W. 2d 133, 135.

But notwithstanding this, the petitioner was simultaneously violating another part of the *same* loitering ordinance in that he was trespassing and loafing in a tavern, without *first* having obtained the express consent of the owner or controller.

Section 244.080(3) of the Kentucky Revised Statutes (App. A, p. 28) forbids the sale of alcoholic beverages to anyone convicted of drunkenness three or

*"Mr. Lusky: The record will show I was the one that said 7:30.

Mr. Dougherty: He said 7:15.

The Witness: Well, I didn't have a watch on and I didn't know the time.

Q. You didn't know what time the bus was due?

A. Yes."

more times within the past twelve months. § 244.120(1) (App. A, p. 28) forbids alcoholic beverage licenses to permit "people of ill repute to congregate on the premises." § 61-46 of the Louisville General Ordinances (App. A, p. 23) forbids dancing in any place where alcoholic beverages are sold (excepting hotels).

At the time the petitioner entered the saloon, he had been convicted of being drunk in a public place eight times within the year preceding January 24, 1959 (App. B, p. 29). From a legal standpoint, his presence was an anathema to any person licensed to sell alcoholic beverages. It would have been a violation of the alcoholic beverage laws to sell the petitioner a drink, and the manager in fact testified that he had sold him nothing (R. 26), nor had he seen him eat anything (R. 28). Thus the petitioner's actions clearly indicated a trespass *ab initio*. *Barrett* v. *Lightfoot* (1824), 17 Ky. (1 T. B. Monroe) *241, 15 Am. Dec. 110; cf. *Markham* v. *Brown* (1837), 8 N. H. 523, 31 Am. Dec. 209. He abused his original entry by wrongful actions which placed a valuable right of the owner in jeopardy, and this without even purchasing anything there (R. 2, 25, 26). This was a trespass.

The petitioner argues that the absent owner (R. 29) impliedly consented to his presence. It has already been shown (p. 7) that implied consent is not a sufficient defense to a violation of the loitering ordinance as construed by the court. But even if implied consent were sufficient, the petitioner did not have it. The rule of implication works both ways, and little demonstration is necessary to show that the owner did not im-

pliedly consent to the presence of one who placed his city and state alcoholic beverage licenses in jeopardy on three separate counts.

The owner of the tavern consented to the entry of the general public only for the purpose of making purchases. This was a business—not a place for dancing auditions. The petitioner had been in the tavern for over a half hour, had purchased nothing—except by his own testimony, and was dancing when the officers entered. He had not *first* obtained the consent of the controller to do these things without buying something, and the controller in fact testified that he didn't want the petitioner to dance there (R. 27). It is obvious that the petitioner was violating either of two parts of the loitering ordinance and the police were authorized to make the arrest.

The foregoing evidence having established that the petitioner was loitering within the meaning of the ordinance, the further consideration arises whether at the time of his arrest petitioner:

(1) Had *visible* means of support, or, alternatively,

(2) Was unable to give a *satisfactory* account of himself.

Many who have seen the petitioner agree that he has no *visible* means of support. He testified that he works only one day a week (R. 17), and he *appears* to have no financial responsibility whatever. Unlike the vagrancy statute, the loitering ordinance does not make proof of means of support a defense to a charge of loitering.

The fact that a person has no *visible* means of support is an element of loitering. [It was this distinction which the prosecutor had in mind when he emphasized that this was a charge of loitering—not vagrancy (R. 16).]

Alternatively, at the time of his arrest the petitioner was unable to give a satisfactory account of himself. Certainly the arresting officer, Mr. Lacefield, so believed and apparently the police judge likewise so believed. That this is a reasonable attitude on the part of both the arresting officer and the police judge in the light of the evidence can easily be established if the Court would place themselves in the position of the arresting officer at the time and place of the arrest. Consider these facts which confronted Mr. Lacefield *at the time of the arrest*:

The police officers entered a tavern on a routine check as specified by local ordinance as a condition to enforcing propriety and order on premises licensed to sell liquor. That same ordinance of the City forbids dancing on any licensed premises other than hotels. This tavern was not of such a nature. When the police officers entered these premises, which are open to the public for the purpose of selling food and alcoholic beverages to the public, and for no other purpose, they found the petitioner dancing by himself in the middle of the floor, neither eating nor drinking. When queried by the arresting officer as to what he was doing on these premises, he did not answer that he was waiting to be served food or drink, or any other reason associated with the business purpose of the

premises but said that he was waiting for a bus! These premises face upon a one-way street going west, whereas any bus which the petitioner would catch to return to his home would be going east on a one-way street approximately one block from the entrance to the tavern.

Certainly no reasonable man can say that the petitioner gave a satisfactory account of himself.

As to the disorderly conduct charge (App. A, p. 25), the petitioner contends that a person must always argue back and forth with the arresting officer (Pet. Brief, p. 19), otherwise, this will be a waiver of his right to question the validtiy of the arrest. Two cases are cited (Pet. Brief, pp. 19-20): *Nickell* v. *Commonwealth* (1955), Ky., 285 S. W. 2d 495, and *Sternberg* v. *Hogg* (1934), 254 Ky. 761, 72 S. W. 2d 421. In the *Sternberg* case, *supra,* the question was whether or not the arresting officer informed the accused of his intention to arrest him. In the *Nickell* case, *supra,* the Court said at 285 S. W. 2d 496:

> "The provision [§ 39 of the Criminal Code] has always been construed as requiring only a substantial compliance, and notwithstanding the absence of qualification, as not requiring its observance where it is impractical or futile, as where the person about to be arrested knows of the officer's intention or purpose or when he resists arrest or when the officer has no reasonable opportunity to inform him."

The police informed the petitioner of their intention to arrest him and the nature of the charge (R. 2, 25). Arguing back and forth (R. 3) was uncalled for. The evidence plainly supports the disorderly conduct charge.

Moreover, the highest court of Kentucky has held that "it has long been the rule that a peace officer who arrests one for being . . . disorderly in his presence is not liable in an action for false arrest and imprisonment if . . . he had reasonable grounds to believe and did believe in good faith, that the person arrested was . . . disorderly in his presence." *Giannini* v. *Garland* (1944), 296 Ky. 361, 177 S. W. 2d 133, 136.

There was evidence to support the offenses charged. Granted that there was also conflicting evidence, no Constitutional restriction prevents a judge from resolving such conflicts favorably to the Commonwealth.

This Court has reiterated that while it will examine the record of a state court in criminal cases involving a claimed denial of Constitutional rights, it will not overrule the state court on the propriety of admitting evidence "shocking to the sensibilities," as a denial of due process, *Lisenba* v. *California* (1941), 314 U. S. 219, 228, nor will the Court overrule a state court on fairly debatable factual issues. *Hoag* v. *New Jersey* (1958), 356 U. S. 464, 471. Respect for the conclusion of the state judiciary compels the acceptance of the conclusion of the trier on disputed issues unless it is so *lacking* in support as to violate due process. *Akins* v. *Texas* (1945), 325 U. S. 398, 402. It

cannot be denied that the facts in this case, both for and against conviction, are "fairly debatable."

II. Due Process of Law Does Not Require Appellate Review of Convictions for Petty Misdemeanors.

It requires little citation of authority to assert that "due process of law does not require a State to afford review of criminal judgments." *Griffin* v. *Illinois* (1956), 351 U. S. 12, 21.

> "A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow such a review. A citation of authorities upon the point is unnecessary." *McKane* v. *Durston* (1894), 153 U. S. 684, 687; *Andrews* v. *Swartz* (1895), 156 U. S. 272, 275; *Murphy* v. *Massachusetts* (1900), 177 U. S. 155, 158.

It has long been recognized that the right to appellate review is a matter of legislative grace. *United States* v. *More* (1805), 7 U. S. (3 Cranch) 159, 171, 173; *Cobbledick* v. *United States* (1940), 309 U. S. 323, 325.

But notwithstanding, Kentucky *does* grant an appeal as a matter of right in all cases before the Louisville Police Court where a fine of twenty dollars or more, or imprisonment of more than ten days, is imposed. § 26.080 (1) and (3), Kentucky Revised Statutes (App. A, p. 27). This is certainly a reason-

able line of demarcation. Chaos would result from allowing a review of every infinitesimal penalty imposed by the police court. The court handles more than 25,000 cases each year. One can barely visualize the appellate dockets with more than 25,000 cases added to the multitude of original actions which are filed direct in those higher courts. The utopian system necessary to handle so many additional appeals would entail prodigious expense. To attempt the handling of such an increase under the present system would indeed result in a "leaden footed" judicial administration.

It is further suggested that a jury trial should be made available in cases involving fines of less than one hundred dollars, or fifty days' imprisonment (Pet. Brief, pp. 39-41). While this proposal also is ideal, it too ignores realities.

Summary trials for petty offenses are indigenous to the common law and their Constitutionality has been consistently upheld:

> "In the fact of this history, we find it impossible to say that a ninety day penalty for a petty offense, meted out upon a trial without a jury, does not conform to standards which prevailed when the Constitution was adopted, or was not then contemplated as appropriate notwithstanding the Constitutional guaranty of a jury trial. This conclusion is unaffected by the fact that respondent is not entitled to an appeal as of right. . . ." *District of Columbia* v. *Clawans* (1937), 300 U. S. 617, 627.

The reasons for the existence of summary trials for petty offenses still include those put forth by Blackstone, 4 Blackstone, Commentaries *280:

> ". . . for the greater ease of the subject by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offense."

Speedy justice in such cases is advantageous not only to the defendant, but to the city and state as well. The jails would be packed with individuals charged with minor offenses, unable to make bail, boarding at public expense while awaiting a trial. Moreover, the burden to the citizen who must serve as a juror at these frequent hearings would be unbearable. Civic duty constitutes only one of the myriad demands for a prospective juror's limited time.

Unfortunately, theoretical ideals do conflict with practical realities. Providing appellate reviews and jury trials for every petty offense is just such an instance. It therefore becomes simply a matter of expediency. Of course, expediency should not be permitted to result in great injustice, but in the case of a petty offense with a small punishment, the injustice is not great. It may exist, but the defendant can not be greatly injured. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner* (1921), 256 U. S. 345, 349.

III. It Can Not Be Asserted That Kentucky Affords No Redress for Alleged Injuries Arising Out of Non-Appealable Convictions Until the Highest Court of the State Has Been Given the Opportunity to Pass Directly on the Question.

We believe it manifestly incorrect to argue the existence or non-existence of a civil or criminal remedy to vindicate alleged injustices arising out of non-appealable fines. This question was never submitted to the court below, nor has the highest court of Kentucky been afforded the opportunity to study the situation by a consideration of briefs and arguments. This case was never before the Kentucky Court of Appeals. The only question which the court considered was the propriety of the Circuit Court's staying the judgment of the Louisville Police Court by a writ of habeas corpus. Because no basis in Kentucky decision law exists for the petitioner's premise, it should be ignored. The Kentucky Court of Appeals has previously stated:

> "The arm of justice in Kentucky ought not to be any weaker or shorter than it is in the Federal courts. Our State Constitution also insures every person a 'remedy by due course of law' for an injury done him in his person. Sec. 14. And we have already recognized that the writ of coram nobis is a part of our 'due course of law.'" *Anderson* v. *Buchanan* (1943), 292 Ky. 810, 168 S. W. 2d 48, 52.

Section 110 of the Kentucky Constitution (App. A, p. 28) provides:

> "The Court of Appeals . . . shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

The Kentucky Court of Appeals has held that small fines alone do not constitute irreparable injury. *Thompson* v. *Wood* (1955), Ky., 277 S. W. 2d 472, 474; *Walters* v. *Fowler* (1955), Ky., 280 S. W. 2d 523, 524. However, the court implied that if a great and irreparable injury would be done, the Court of Appeals would assume jurisdiction under § 110 of the Kentucky Constitution. *Thompson* v. *Wood, supra,* at 474. Where, as here, there is financial inability to pay, as well as the other circumstances alleged, creating such a great and irreparable injury, the Court of Appeals probably would take jurisdiction. Certainly that court never has been confronted with this situation, and should be given an opportunity to consider whether petitioner is suffering a great and irreparable injury.

IV. Frequent Convictions Do Not Transform Arrests Into Reprisals.

An attempt was made to establish whether or not the police were familiar with the past record of the petitioner (R. 11). The purpose now appears to be the establishment of a premise (Pet. Brief, p. 57) that any subsequent arrests are "reprisals." Non sequitur.

Whether or not the police knew of the petitioner's record is immaterial so long as the elements of an offense exists to justify the arrest.

But it should be emphasized that past experience is, for the law enforcement officer, an indispensable aid for evaluating the actions of certain individuals who are frequent violaters. Loitering, vagrancy, and "suspicious persons" laws are somewhat anomalous categories. They are not susceptible to the same tangible modes of proof that disclose most offenses.

The purpose of such laws, particularly in municipal areas, is obvious. Yet they would play a worthless role in preserving the safety and welfare if police officers must turn their heads to await only the most pronounced evidence, for such proof is not common to these offenses. Of course, the power to arrest on such grounds should be used with great care.

But one characteristic common to such offenses is that they arise more from a course of conduct or a manner of life than from an isolated act. Granted that any person can make himself appear exceedingly suspicious or idle at a given time, yet the vast majority of such cases involve recidivists. While such experience is not a license to arrest past offenders, it can hardly be discounted by a conscientious policeman. Many major crimes have been nipped in the bud by such vigilance.

There is no meritorious basis for petitioner's claim of reprisals. This argument should be summarily dismissed.

CONCLUSION.

For the reasons stated it is respectfully submitted that both of the judgments of the Louisville Police Court, entered February 3, 1959, should be affirmed.

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